

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 27.01.2011*

+ **RSA No.192/2010**

UNION OF INDIA
Through: Appellant
Mr.V.S.R. Krishna, Advocate.

Versus

RMI METALS PVT. LTD. Respondent
Through: Mr. Amar Khera Adv.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

CM No.18933/2010 (delay in filing) & CM No.18934.2010 (delay in filing)

There is no substantial opposition to these applications. In view thereof the delay of 25 days in filing the appeal as well as the delay of 644 days in re-filing the appeal is condoned. Applications are disposed of.

RSA No.192/2010

1. This appeal has been directed against the impugned judgment and decree dated 7.4.2008 whereby the suit filed by the plaintiff M/s RMI Metals Pvt. Ltd. seeking a refund of his earnest money which had been deposited with the defendant i.e. the Ordnance Factory, Ministry of Defence, Muradnagar, District Ghaziabad had been decreed in his favour.

2. Plaintiff vide his letter dated 30.12.2002 had submitted his bid against the tender which had been floated by the defendant. This was for the supply of 4000 kg of FM Low Carbon Lumbs (the Bid Product). The plaintiff while submitting his offer had made an error in the price which he had quoted; instead of ₹369/- per kg. inadvertently due to typographical mistake he had quoted the price of ₹269 per kg. On 04.1.2003 vide fax message plaintiff informed this error to the defendant. On 7.1.2003 defendants confirmed two facts (i) plaintiff's offer was under consideration; (ii) payment condition stipulated by the plaintiff in the bid was unacceptable to the defendant. Further the plaintiff was directed either to accept the defendant's normal payment conditions of 100% payment to be made within 30 to 45 days as also to submit the company profile. The plaintiff did not accede to this advice. Earnest money which had been deposited by the plaintiff along with the tender document stood forfeited by the defendant by relying upon clause 9 of the tender document. Present suit was filed praying for a refund of the said amount.

3. The defendant had contested the suit. His defence was that a contract stood completed at the time when the plaintiff had submitted his offer; the defendant was yet within its rights to forfeit the earnest money. It was even otherwise not a precondition to the conclusion of the contract.

4. Trial judge had framed the following issues: they read as follows:

"1. Whether the plaint discloses no cause of action against Defendant? OPD

2. Whether suit is not maintainable for non service of statutory notice U/S 80 CPC? OPD

3. Whether plaintiff has concealed material facts before the court

and has come with uncleaned hands? OPD

4. Whether plaintiff is entitled to the relief of refund as prayed for?

OPP

5. Whether the plaintiff is entitled to any interest if so from which period and at what rate? OPP

6. Relief.”

5. On the basis of the oral and documentary evidence led by the respective parties, the suit of the plaintiff was decreed. The trial judge had held that the earnest money deposited by the plaintiff was not liable to be forfeited as a contract had not come into existence between the parties; the oral and the documentary evidence which included the correspondence exchanged between the parties as also the fax messages dated 4.1.2003 and 7.1.2003 had been adverted to. Suit of the plaintiff was decreed.

6. This was affirmed by the first appellate Court.

7. This is a second. It is yet at the stage of admission. On behalf of the appellant, it has been urged that the findings in the impugned judgment are perverse and call for interference; the defendant was well within its right to forfeit the earnest money. Heavy reliance has been placed upon Clause 9 of the agreement.

8. Arguments have been countered.

9. On the perusal of the record, it is noted that the tender document had been proved before the Court as Ex.PW-1/2. Clause 6 is relevant; it reads as follows:

“The successful tenderer will be notified on IAFZ-2124 of acceptance of his tender in whole or in part. Till then no tenderer has any right to assume that his tender has been accepted, in whole or in part and if any tenderer disregards this warning and makes any arrangement or incurs any expenditure in anticipation of receipt of notice of acceptance, he will have no claim for compensation.”

Perusal of this Clause shows that the successful tenderer had to be notified of the acceptance of his tender either in whole or in part before the tenderer would not have any right in terms of this tender document.

Clause 9 reads as follows:

“The tenderer shall hold the offer open up to and including..... it is understood that the tender document have been sold/issued to the tenderer and the tenderer is being permitted to tender in consideration of the stipulation on his part that after submitting his tender he will not resile from his offer or modify the terms and conditions thereof. Should the tender fail to observe and comply with the foregoing stipulation, the earnest money shall be forfeited to the Government without prejudice to any other rights of the Government under this contract and the law. The earnest money shall also be liable to be forfeited in full, if the tenderer fails to furnish security deposit by the due date. No interest will be payable on the amount of the earnest money in any case.

No cognizance will be taken of any communication relating to withdrawal revocation or amendment to the tender already submitted except when it is in the form of a letter duly signed by the tenderer, if the tenderer, is an individual, by all the partners of the firm of tenderers of this duly accredited attorney, if the tenderers are a partnership firm and by a person having express authority in the case of a limited company.”

It is clear from a reading of the aforementioned Clauses of Ex.PW-1/2 that at the time when the plaintiff submitted his tender it was only an offer which was made by him to the company. The offer was yet to be accepted. On 4.1.2003, a correction was made in the offer. On 7.1.2003 vide fax message he was informed that this correction will not be permitted. Further, his offer was yet under

consideration. It is thus clear that up to 7.1.2003 the contract between the parties had not come into existence. The further conditions stipulated in the fax message dated 7.1.2003 that the full amount should be paid by the plaintiff within 30 to 40 days had also admittedly not been accepted by the plaintiff. Clause 6 of Ex.PW-1/2 was also specific. Admittedly the acceptance of the offer of the plaintiff had not been notified by the defendant to the plaintiff; this has been elicited in the version of DW-1. A contract not having been come into existence between the parties, the Courts below had rightly given concurrent findings in favour of the plaintiff. Clause 9 could not be resorted to by the defendant; earnest money could not have been forfeited. The plaintiff was rightly entitled to refund of the said money.

10. Substantial questions of law have been embodied on page 6 of the memorandum of appeal.

11. No such substantial question of law having arisen either from the pleadings or from the arguments urged before this Court, the appeal is dismissed in limine.

INDERMEET KAUR, J.

JANUARY 27, 2011
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